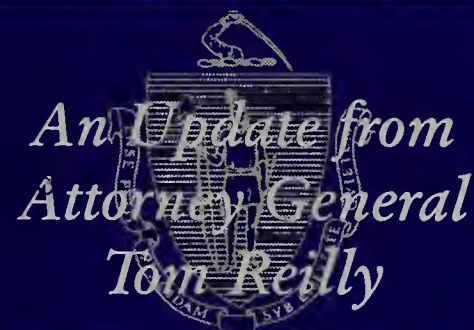




# Law Enforcement Newsletter



## A Letter from the Attorney General:

As many of you know, enjoying a good working relationship with the law enforcement community has always been one of my highest priorities. My office continues to meet with the Massachusetts Chiefs of Police Association and the Police Chiefs Advisory Board in an effort to ensure that my office appreciates the needs and concerns of police departments across the state. Communities throughout the state have benefitted from our open exchange of ideas and perspectives as we, together, continue to address the issues that confront our citizens. Our collaboration, as well as our hard work and innovation, is invaluable and I look forward to it on an ongoing basis.

This issue of the *Law Enforcement Newsletter* focuses on several important areas. The Attorney General's Office has consistently demonstrated its commitment to protecting elderly citizens in the Commonwealth. The office's Medicaid Fraud Control Unit (MFCU) is the primary mechanism by which my office protects elderly and disabled residents of Massachusetts nursing homes from physical neglect and abuse and financial exploitation. With the help of additional funds committed by the legislature last year to MFCU and the Massachusetts Department of Public Health, our office continues the fight against patient abuse in nursing homes. As part of that effort, the Attorney General's Office, along with Sen. Cynthia Creem, has filed a legislative proposal in the 2001-2002 Legislative Session that focuses on crimes against elderly and disabled persons. Specifically, the proposal would expand the scope of G.L. c. 265, §13K, which governs the crime of assault and battery on elderly and disabled persons, by including definitions of abuse, neglect and mistreatment, and by providing misdemeanor penalties for those crimes when wantonly or recklessly committed by caretakers. The bill would also amend G.L. c. 265, §13H, to allow for enhanced penalties when the victim of an indecent assault and battery is elderly or disabled.

My office also remains committed to working toward effective prosecution of high tech and computer crimes. In this issue, our High Tech and Computer Crimes Division reviews a hypothetical investigation of an on-line threats case and examines the criminal charges which may apply, including stalking, harassment, threats and disorderly conduct. However, recognizing the inadequacy of the tools presently available to combat high tech crime, our office has also proposed several pieces of legislation aimed at achieving more effective prosecution. These proposals include:

- *Child Enticement* -- This bill would amend G.L. c. 265, §26B to criminalize the enticement of a child. The section would make

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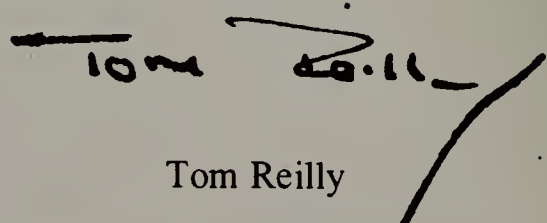
physical enticement, electronic enticement (i.e., computer) and facilitating enticement or solicitation of a child illegal. (Lead legislative sponsors -- Senator David Magnani and Representative Harold Naughton).

- *Computer Generated Child Pornography* -- This proposal would amend the child pornography statutes to clarify that the laws against *distribution* of child pornography apply to visual images, including digital images. Existing law prohibiting *possession* of child pornography explicitly includes "depiction by computer;" however, the laws prohibiting distribution of child pornography have not been similarly updated. (Lead legislative sponsor -- Senator Richard Tisei).
- *Administrative Subpoenas* -- This bill would allow administrative subpoenas to be issued to telephone companies and Internet Service Providers (and other providers of electronic communication services), and would permit a District Attorney or the Attorney General to use administrative subpoenas when they have "reasonable grounds to believe" that records of such a provider "are relevant and material to an ongoing criminal investigation." (Lead legislative sponsors-- Senator Cheryl Jacques and Representative Harriet Stanley).
- *Terroristic Threats* -- This bill would replace G.L. c. 269, § 14 (false report of explosives statute) with an updated statute criminalizing the communication of a terroristic threat, defined as a threat of harm or damage, no matter how communicated, that is made with the intent to cause a person to fear death, bodily injury or property damage, or with the intent to cause evacuation, serious disruption, or serious public inconvenience or alarm. The statute would not require the perpetrator to have the intent or the ability to carry out the threatened crime. (Lead legislative sponsors --Senator Cheryl Jacques and Representative Harriet Stanley).
- *Unauthorized Access to Computers* -- This proposal would expand the range of computer-based conduct that is prohibited by criminal law and modify the penalty structure to reflect the harm that is caused by the unlawful access. The proposal would create a two-tiered penalty structure designed to recognize that some hackers access computers without significant malicious intent and without causing significant harm, while others act with a malicious purpose and intend to cause significant harm. Punishment for the first category would be limited to two and a half years in the House of Correction; punishment for the latter category could be up to ten years in state prison). (Lead legislative sponsors --Senator Cheryl Jacques and Representative Harriet Stanley).

As the Legislative Session progresses, my office will use its best efforts to ensure passage of these bills. It is our hope that passage of these bills will help ensure the safety of our citizens, and provide members of law enforcement with the tools you need to effectively police your communities.

I look forward to our continuing partnership.

Sincerely,

  
Tom Reilly

## GENERAL LAWS UPDATE

Michael Fabbri, Assistant District Attorney  
Middlesex County

Sean Kealy, Legal Counsel  
Joint Legislative Committee on  
Criminal Justice

### CHANGES TO THE GENERAL LAWS

#### **An Act Further Regulating Bicycle Messengers In The City Of Boston**

(Chapter 280 of 2000, effective December 21, 2000).

This law amends chapter 302 of the Acts of 1998, which regulated bicycle messengers by mandating, in part, the display of their city issued license when making deliveries. This amendment mandates that messengers also display a commercial messenger identification device on their back or backpack.

#### **An Act Relative To The Possession of Alcoholic Beverages in Motor Vehicles**

(Chapter 294 of 2000, effective by emergency preamble on October 10, 2000.)

This law amends M.G.L. c. 90 § 24 I, which regulates the possession of alcohol within a motor vehicle. Previously, only the driver was forbidden from possessing an open container of alcohol. The new law restricts anyone within the passenger area of a motor vehicle from possessing an open container. Exceptions to this new rule are made for (1) the passengers of a motor vehicle designed, maintained and used for the transportation of persons for compensation, or (2) the living quarters of a house coach or house trailer. Whoever possesses an open container in violation of this section shall be punished by a fine of \$100 to \$500.

#### **An Act Relative To Dog Guides**

(Chapter 126 of 2000, effective October 7, 2000) amends G. L. c. 272 § 98A, which governs accommodation to physically handicapped persons with a dog guide, by removing the requirement that a guide dog must be properly muzzled if requested by the person in control of a public accommodation.

#### **An Act Relative To The Crime of Criminal Harassment**

(Chapter 164 of 2000, effective November 1, 2000) creates the crime of criminal harassment, G.L. c. 265 § 43A, to punish harassing behavior that does not rise to the level of stalking (G.L. c. 265 § 43) where the behavior does not include an overt threat. This law targets those who willfully and maliciously engage in a knowing pattern of conduct or series of acts over a period of time directed at a specific person. This law defines "conduct or acts" as including, but not limited to, conduct or acts conducted by mail, telephone, electronic mail, internet communications or facsimile communications. A defendant's conduct must a) seriously alarm the targeted person and b) rise to the level where it would cause a reasonable person to suffer substantial emotional distress. This crime is punishable by imprisonment in a house of correction for not more than 2 ½ years or by a fine of not more than \$1,000, or by both fine and imprisonment. A second or subsequent offense is punishable

*(General Laws Update, continued)*

by imprisonment in a house of correction for not more than 2 ½ years or by imprisonment in the state prison for not more than 10 years.

**FY 2001 Budget.** The following provisions of the annual state budget enacted on July 31, 2000, impact the criminal justice system.

**Line items 0340-0100 to 0340-0110:** The budgets for each of the District Attorneys' Offices specify that no assistant district attorney shall be paid a salary of less than \$35,000.

**Outside Section 20:** Extends Community Based Juvenile Justice Programs to the Worcester, Hampshire/Franklin, and Norfolk District Attorney's Offices. These programs identify cases in which juvenile offenders are most likely to pose a threat to the community and work with schools, courts, and other agencies to deter violent, criminal or delinquent conduct.

**Outside Section 51:** Prevents persons who have been convicted of an offense under Chapter 94C, or who have been imprisoned for a misdemeanor conviction, from becoming an employee of the State Police.

**Outside Sections 233, 313:** Staggers the expiration dates of Firearm Identification (FID) Cards.

**Outside Sections 251-252:** Increases the number of Appeals Court Justices from 13 to 21.

**Outside Sections 253-254:** Increases number of Trial Court Justices to 372.

**Outside Sections 269-274:** Increases number of Juvenile Court Justices to 41.

**Outside Sections 285-289:** Transfers payment authority for the Victims of Crime Compensation Account from the Office of the Treasurer to the Office of the Attorney General.

**Outside Section 320:** Increases the number of students in the State Police Class to 180.

**An Act Relative to Disclosure of Information To The State Police Violent Fugitive Arrest Squad** (Chapter 166 of 2000, effective November 4, 2000).

This law gives law enforcement officers greater ability to locate fugitives. This law also suspends benefits and privileges for wanted fugitives. Major provisions of the law are as follows:

- State benefits and privileges such as welfare benefits, unemployment benefits, worker's compensation benefits, and professional licenses of people who have an outstanding arrest warrant will be suspended until the person has cleared the warrant. State tax refunds will also be withheld until arrest warrants are cleared.
- The Registry of Motor Vehicles will actively suspend the drivers' licenses of wanted fugitives. Current law relies on a more passive system of non-renewal that can take up to five years.
- The issuing court will notify the subject of an arrest warrant and explain how to clear the warrant. The notice will also clearly state the consequences of not clearing the warrant. Pilot programs have shown an approximate 30 percent rate of response to such notification letters.

*(General Laws Update, continued)*

- Law enforcement officers will have the authority to receive, through cross-matching, address or other identifying information held by other state agencies for the sole purpose of locating individuals who are wanted on arrest warrants.

## **An Act Relative to the Sale Or Delivery of Alcoholic Beverages or Alcohol To A Person Under 21 Years Of Age**

(Chapter 175 of 2000, effective by emergency preamble on August 4, 2000).

This law amends G.L. Chapter 138 § 34, which governs the sale or delivery or furnishing of alcoholic beverages to minors, to increase the maximum sentence to the house of correction from 6 months to 1 year. This law also inserts a definition of the word "furnish," which shall mean "to knowingly or intentionally supply, give, or provide or to allow a person under 21 years of age except for the children or grandchildren of the person being charged to possess alcoholic beverages on premises or property owned or controlled by the person charged."

## **An Act Relative to First Amendment Rights at Reproductive Health Care Facilities**

(Chapter 217 of 2000, effective November 10, 2000).

This law creates a new section, G.L. Chapter 266 § 120E ½, to create "buffer zones" around the entrances and driveways of reproductive health care clinics. This new law creates a zone of 18 feet around the entrances and driveways of reproductive health care facilities where time, place and manner restrictions will be placed on protests, leafleting, counseling, displaying a sign, or other forms of speech. Within this fixed zone, a person may not knowingly come within 6 feet of another person or occupied motor vehicle without that person's consent. These restrictions will only be in effect during the business hours of the facility. This section also prohibits any person from knowingly obstructing another person's entry into or exit from a reproductive health care facility.

The penalty for violating this section is a fine of not more than \$500 or not more than 3 months in a house of correction, or both fine and imprisonment. The penalty for a second or subsequent offense is a fine of \$500-\$5,000 or not more than 2 ½ years in a house of correction, or both fine and imprisonment. A person who knowingly violates this section may be arrested without a warrant by a sheriff, deputy sheriff, or police officer.

## **An Act Providing For the Collection of Data Relative to Traffic Stops**

(Chapter 228 of 2000, effective November 10, 2000).

This law directs the State Police and the Massachusetts Chiefs of Police Association to develop policies and procedures on how to identify and prevent racial and gender profiling by police officers. This law also directs the Executive Office of Public Safety (EOPS) to initiate a public awareness campaign on racial and gender profiling by January 1, 2001. EOPS must also establish a protocol for state and municipal police on how to use the Massachusetts Uniform Citation to record the race and gender of each individual cited by an officer for a motor vehicle violation and whether a search of the vehicle took place. Provisions are also made for the collection and analysis of data related to racial profiling.

*(General Laws Update, continued)*

**An Act Relative to 209A Action Court Records**

(Chapter 236 of 2000 § 24, effective by emergency preamble August 10, 2000).

This law amends G.L. Chapter 209A § 8 to specify that a plaintiff's residential address, residential telephone number and workplace name, address and telephone number shall be confidential and withheld from public inspection. The information shall be accessible, however, to prosecutors, victim-witness advocates, domestic violence victim's counselors, sexual assault counselors, and law enforcement officers, if such access is necessary in the performance of their duties.

**An Act Relative to the Establishment of a Child Fatality Review Team**

(Chapter 247 of 2000, effective November 10, 2000).

This law establishes multidisciplinary and multi-agency child fatality review teams in each of the 11 districts to be headed by the district attorney. In addition to the DA, teams shall be comprised of at least: the chief medical examiner, the Commissioner of DSS, a pediatrician with experience diagnosing or treating child abuse, a law enforcement officer appointed by the State Police Colonel, a local law enforcement officer from the city in which the fatality occurred, the chief justice of the Juvenile Court, the director of the Massachusetts Center for Sudden Infant Death Syndrome and the Commissioner of DPH. This law also establishes a statewide child fatality team within the Chief Medical Examiner's Office.

The purpose of these teams is to decrease the incidence of preventable child deaths and injuries. The teams shall develop an understanding of the causes and incidence of child death and recommend changes to the law to better prevent child deaths, collect information on child deaths, and promote coordination between agencies responding to child deaths.

The child fatality team meeting shall be closed to the public, and information acquired by the team shall be confidential and may only be disclosed to carry out the team's duties and purposes.

**An Act to Improve the Emergency Medical Services System**

(Chapter 54 of 2000, effective March 30, 2000).

This law replaced the former G.L. c. 111C, and, in relevant part, increases the maximum fine for a violation of this chapter. According to the new G.L. c. 111C, §19 no person may:

- a) establish or maintain an Emergency Medical Service (EMS), first response service or ambulance service without a valid license;
- b) operate a means of transportation as an EMS vehicle without a valid certificate of inspection;
- c) hold oneself out as emergency medical personnel other than on behalf of a licensed EMS provider;
- d) establish or maintain a trauma center without approval;
- e) obstruct or interfere with an investigation under this chapter;
- f) knowingly making an omission of a material fact or a false statement in any application or other document filed with the Department of Public Health; or

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*(General Laws Update, continued)*

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g) fail to observe any requirement of this chapter.

Whoever violates this section shall be punished by a fine of not less than \$100 and not more than \$1,000 for each offense.

### **An Act Relative To Veterinarians Reporting Cruelty To Animals**

(Chapter 314 of the Acts of 2000, effective February 9, 2001)

This law amends G.L. c. 112 by adding a new section, 58B, to state that a registered veterinarian who reports, in good faith and in the normal course of business, a suspected act of cruelty to animals prohibited under G.L. c. 272, §§ 77 and 94 to a police officer shall not be liable in a civil or criminal action for reporting the act.

### **An Act Relative to Hoax Devices**

(Chapter 421 of 2000, effective April 12, 2001).

This law amends G.L. chapter 266 by inserting a new section, section 102A½, which creates the crime of possessing or placing a fake bomb or "hoax device." The new law proscribes anyone from either possessing, transporting, using or placing, or causing another to knowingly or unknowingly possess, transport, use or place any hoax device with the intent to cause anxiety, unrest, fear or personal discomfort to any person or group of persons. A "hoax device" is defined as "any device that would cause a person reasonably to believe that such device is an infernal machine." "Infernal machine" is defined as "any device for endangering life or doing unusual damage to property, or both, by fire or explosion, whether or not contrived to ignite or explode automatically." A violation of this statute shall be punished by imprisonment in a house of correction for not more than 2 ½ years or in the state prison for not more than 5 years or by a fine of not more than \$5,000, or by both a fine and imprisonment. This section does not apply to any law enforcement or public safety officer acting in the lawful discharge of official duties.

# DOMESTIC VIOLENCE UPDATE

Emily Paradise, Assistant Attorney General

Beth Merachnik, Chief

Community-Based Justice Bureau

## LEGISLATIVE UPDATE

***Criminal Harassment*** — The legislature recently enacted a law creating the crime of ‘criminal harassment.’ The new law, section 43A of Massachusetts General Laws c. 265, defines criminal harassment as willfully and maliciously engaging in a knowing pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress. The crime is punishable by two and a half years in jail, a fine of not more than \$1,000 or both. Conduct which falls within the ambit of the statute includes, but is not limited to, acts committed by mail or through the use of a telephone or telecommunication device including e-mail, Internet communications or fax transmissions. Second or subsequent convictions or a conviction following a prior conviction for stalking may be punished by up to two and a half years in jail or ten years in state prison.

***Restraining Orders*** — The legislature recently clarified c. 209A to specify that the plaintiff’s residential address and telephone number and workplace name, address and telephone number shall be confidential and withheld from public inspection. The plaintiff’s residential and workplace address will appear on the order and be available to the defendant and defense counsel unless the plaintiff specifically requests that the information be withheld from the order. All confidential portions of the records will be available to plaintiff and plaintiff’s counsel, to others authorized by the plaintiff to obtain the information, and to prosecutors, victim witness advocates, domestic violence victim’s counselors, sexual assault counselors, and law enforcement officers, if such access is necessary in the performance of their duties.

***Address Confidentiality Program*** — The legislature recently signed into law a bill establishing an address confidentiality program for certain victims. Under the new law, victims of domestic abuse, rape, sexual assault and stalking may, on the recommendation of an application assistant, apply to the state secretary to have an address designated by the secretary serve as their address. If approved, the participant’s actual address may be disclosed or made available for inspection or copying only under limited circumstances. The new law specifies the information that an application must contain, including the address(es) “that the applicant requests not be disclosed for the reason that disclosure will jeopardize the applicant’s safety or increase the risk of violence to the applicant or members of the applicant’s household.” Certification as a program participant is valid for four years from the date of filing. Providing false or incorrect information in an application or falsely claiming that disclosure will pose a safety threat is punishable by a fine of not more than \$500 or imprisonment for not more than six months in the house of correction and cancellation of program certification.

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*(Domestic Violence Update, continued)*

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**CASE LAW UPDATE**

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***First Circuit Upholds Dismissal of c. 209A Challenge*** — The United States Court of Appeals for the First Circuit recently affirmed the United States District Court's dismissal of a challenge to c. 209A. At issue in Nollet v. Justices of the Trial Court of the Commonwealth of Massachusetts, 2000 WL 1803320 (1st Cir. (Mass.)), was the viability of a suit brought by a father's rights group and men involved in domestic abuse proceedings, challenging the constitutionality of c. 209A's initial, *ex parte* hearing. The state court judges who hear domestic abuse cases, named as defendants in the suit, moved to dismiss the complaint. The District Court dismissed the complaint, rejecting plaintiffs' civil rights claims and ruling that the *ex parte* hearings at which temporary restraining orders are granted are constitutional because they provide "all the procedural protections necessary to satisfy the requirements of due process of law", specifically, participation by a judicial officer, a prompt post-deprivation hearing, verified petitions or affidavits containing detailed allegations based on personal knowledge, and risk of immediate and irreparable harm to the plaintiff. In a brief, unpublished *per curiam* decision, the Court of Appeals upheld the District Court's dismissal.

***Anti-SLAPP Statute Applies to c. 209A Restraining Orders*** -- According to the Supreme Judicial Court's ruling in McLarnon v. Jokisch, 431 Mass. 343 (2000), the state's anti-SLAPP (Strategic Litigation Against Public Participation) statute is available to plaintiffs in restraining order actions who face retaliatory litigation from c. 209A defendants. Specifically, the statute permits a party who faces retaliation based on the "exercise of its right of petition" to seek dismissal of the retaliatory action as well as costs and attorney's fees. In this case, Virginia Jokisch obtained a restraining order against her former husband, Edward McLarnon, which was extended several times. McLarnon then filed a complaint against Jokisch and David Douglas, Jokisch's new husband, alleging violation of civil rights, malicious prosecution, alienation of affection and intentional infliction of emotional distress. In response, Jokisch and Douglas filed a motion to dismiss and request for attorney's fees, claiming that McLarnon's suit was "meritless, has no support in fact or law[,] and is based on [Jokisch's and Douglas'] petitioning activity alone." In upholding the lower court's dismissal of McLarnon's suit, the SJC held that the statute protects citizens speaking out on *private*, as well as public, matters. Moreover, the Court concluded that the right of petition, which includes "any written or oral statement made before or submitted to a . . . judicial body," extends to the filing of an abuse prevention order and the supporting affidavits.

***SJC Clarifies that c. 209A Restraining Orders can be Permanent*** — In Crenshaw v. Macklin, 430 Mass. 633 (2000), the Supreme Judicial Court ruled that district court judges have the authority to issue permanent protective orders at renewal hearings. In this case, the plaintiff, Jacqueline Crenshaw, had obtained a restraining order against her longtime boyfriend. On the annual renewal date, Crenshaw requested that the order be made permanent. The district court judge denied her request, stating that the court did not have the authority to issue an order for longer than one year. In overturning the lower court, the SJC cited the language of section 3 of c. 209A which specifically states that on the plaintiff's request for an extension of the order, the court "shall determine whether or not . . . to enter a permanent order." Accordingly, the clear statutory language placed issuance of a permanent order within the judge's discretion.

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*(Domestic Violence Update, continued)*

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***'No Contact' Provision of Restraining Orders*** — Where a protective order includes a 'no-contact' order with an exception allowing the defendant to visit and telephone the plaintiff's home at specified times in order to contact their children, threatening and abusive language directed at the plaintiff will not be permitted. At issue in Commonwealth v. Silva, 431 Mass. 194 (2000), were conversations between the defendant and the plaintiff, during which the defendant yelled, swore and was angry and threatening. After being convicted, the defendant claimed on appeal that it would have been impossible for him to comply with the no contact order because the order permitted contact under certain circumstances. He further claimed that the order was ambiguous because it failed to provide him clear guidance on how to conduct himself on those instances when contact was permitted. Recognizing that a protective order of this sort "raises practical difficulties," the Supreme Judicial Court ruled that brief, direct, nonabusive contact would be permissible. However, the defendant violated the order where a "reasonable man, in the defendant's position, could not have believed that [the] paragraph . . . allowing telephone contact with his children. . . would have sanctioned the angry outbursts that occurred here." The Court also rejected the defendant's claims that the Commonwealth was required to prove that he had an unlawful purpose in making the calls or that he intended to violate the order.

***SJC Considers Public Access to Records of c. 209A Proceedings*** — The Supreme Judicial Court recently ruled in The Boston Herald v. Richard Sharpe, 432 Mass. 593 (2000), that records of proceedings under c. 209A are presumptively open to public inspection. Richard Sharpe, charged with the murder of his wife, appealed a court order which permitted disclosure of previously impounded documents filed in the Sharpes' divorce action and related c. 209A proceeding. In denying his appeal and allowing disclosure of the affidavits filed by his wife in the restraining order proceeding, the SJC cited its "long-standing recognition that 'only in the most extreme situations, if at all, may a State court constitutionally forbid a newspaper (or anyone else) to report or comment on happenings . . . which have been held in open court . . .'" Finding a strong public interest in access to judicial records concerning domestic violence, as well as a statutory presumption under c. 209A favoring disclosure, the Court balanced the "rigorous presumption of openness" against the defendant's right to a fair trial. In the specific circumstances of this case, particularly where so many details had already been publicized, the Court concluded that continued impoundment was not necessary to protect Sharpe's right to a fair trial or to safeguard any privacy rights he may have.

***Probation Terms must be Set by Judge to Serve as Grounds for Violation of Probation*** — In Commonwealth v. Paul MacDonald, 50 Mass. App. Ct. 220 (2000), the Appeals Court held that only the conditions of probation set by a judge, not a probation officer, can serve as grounds for a violation of probation. In that case, a judge had placed the defendant on probation, subject to specific terms, including that he attend a batterer's program, submit to drug and alcohol counseling and 'stay away' from Cynthia Evans. The defendant then signed conditions of probation prepared by his probation officer, which required that the defendant have 'no contact' with Evans. When the defendant sent Evans a letter, the probation officer issued a probation surrender notice on the grounds that he had violated the 'no contact' condition. The defendant filed a motion to dismiss, claiming that the sentencing judge had ordered him only to stay away from Evans and had not prohibited contact. The lower court denied the motion to dismiss, ruling that the signed conditions of probation constituted an enforceable contract. The Appeals Court, however, rejected that reasoning,

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*(Domestic Violence Update, continued)*

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ruling that the “enforceability of probation is derived not from the agreement of the defendant, but from the force of the judge’s order.” Thus, the violation of terms added by a probation officer but not ordered by a judge does not constitute a violation of probation. The Court remanded the case to the lower court for a determination as to the precise conditions of probation imposed by the sentencing judge.

***Court Defines ‘Family or Household Member’*** — The Appeals Court recently upheld the issuance of a restraining order in Sorgman v. Sorgman, 49 Mass. App. Ct. 416 (2000). In this case, the defendant claimed that an order should not have issued against him as he and the plaintiff did not fall within the definition of ‘family or household member,’ as required under the statute. The defendant was the plaintiff’s ex-stepfather, having divorced the plaintiff’s mother some 20 years earlier. In rejecting the defendant’s contention that the statute was not intended to protect ‘ex-stepchildren’, the Court ruled that section 1 of the statute defines ‘family or household member’ to include those who are or *were* residing together in the same household, and those who are or *were* related by blood or marriage. Noting the statute’s use of the word ‘were,’ the Court concluded that the law applies to past as well as present relationships and therefore, covered the defendant and plaintiff who, at one time, did reside together and were related by marriage. The court found nothing in either the statute or case law indicating an intent to exclude stepchildren or to impose a time limitation on the law’s application.

***‘Assault’ Defined*** — In Commonwealth v. Gorassi, 432 Mass. 244 (2000), the defendant appealed his three assault convictions, claiming that the trial judge incorrectly defined the term ‘assault’ by including within the term “an attempt to do psychological harm.” In overturning the defendant’s convictions, the Supreme Judicial Court noted that an assault may be accomplished in one of two ways -- either by an attempt to do bodily harm, or by putting another in fear of immediate bodily harm. Finding that an attempt to do psychological harm did not fall within either category of ‘assault,’ the SJC ruled that the trial judge incorrectly expanded the definition. Of the three counts, there was only evidence concerning one of the incidents from which one could have concluded that the defendant attempted a battery. Thus, that count alone could be retried.

***Telephone Logs of Rape Crisis Center Not Privileged*** — In Commonwealth v. Neumyer, 432 Mass. 23 (2000), the Supreme Judicial Court ruled that the time, date and fact of a communication between a victim of sexual assault and a rape counselor are not privileged under the statutory sexual assault counsellor privilege. The privilege applies to ‘confidential communications’ which are defined as ‘information transmitted in confidence by and between a victim of sexual assault and a sexual assault counsellor . . . includ[ing] all information received by the sexual assault counsellor which arises out of and in the course of such counseling . . .’ Concluding that the date and time of a communication does not constitute ‘information transmitted’ or ‘information received by’ a counsellor during the course of counseling, the SJC upheld the Appeals Court ruling that such information does not fall within the scope of the privilege.

## AGENCY UPDATE

Emily Paradise, Assistant Attorney General

Beth Merachnik, Chief

Community-Based Justice Bureau

***Social Security Administration*** -- To provide greater assistance to victims of domestic violence, the Social Security Administration has established a policy authorizing the agency to issue a new social security number to victims of domestic violence seeking to elude their abuser and reduce the risk of further violence.

To apply for a new social security number, a victim of domestic violence must apply in person at any Social Security office and present the following:

- original documents establishing age, identity, and U.S. citizenship or lawful alien status, such as a birth certificate and driver's license;
- one or more documents identifying the victim by both old and new name if the victim has changed her/his name;
- evidence showing the victim has custody of children for whom the victim is also requesting new numbers; and
- evidence documenting harassment or abuse.

The Social Security Administration will assist the victim in obtaining any additional corroborating evidence, if necessary. The best evidence generally arises from police reports and/or medical reports which describe the nature and extent of the domestic violence. Other evidence might include court documents such as restraining orders, letters from shelters, or letters from counselors or others with knowledge of the domestic abuse.

For more information, visit the Social Security Administration Web site at

**<http://www.ssa.gov>**.

# HIGH TECH AND COMPUTER CRIMES UPDATE

## *Investigating an On-line Threats Case and Associated Criminal Charges*

Julie B. Ross, Assistant Attorney General and John A. Grossman, Chief  
High Tech and Computer Crimes Division

With the ease of accessibility to the Internet, on-line threats are becoming more and more prevalent. With the variety of messaging and free e-mail services available, tracking down the target in an on-line threats case may seem like a difficult and burdensome task. However, as with any investigation, if you know where to look and what to look for, more often than not, the target will leave traces that will lead you right to his or her door.

Using hypothetical case scenarios, this article examines the investigation of an on-line threats case and then discusses the criminal charges you might consider.

### **I. The Investigation:**

#### **a. Hypothetical Case Scenario #1:**

Complainant states that he received a threat via America On Line Instant Messenger Service at his home over the weekend. The threat was from an unknown target using the screen name "Imathreat" and threatened to kill the complainant. The complainant, fearing for his life, calls the police. What should the police or other members of the law enforcement community do?

The first step would be to look at Imathreat's user profile. Some on-line services, including America On Line and Hotmail, an e-mail service provider, offer their users the ability to create user profiles. While individuals often provide false information in their profiles, they are a good starting point because they might contain valid e-mail addresses. In this case, law enforcement went to "Imathreat's" profile, which contained the e-mail address "Illgetcha@aol.com."

Law enforcement then sent a "freeze order" under 18 U.S.C. § 2703(f) requesting the preservation of all records for the account "Illgetcha@aol.com." Next, law enforcement sent a grand jury subpoena to America On Line requesting all subscriber records for the e-mail address "Illgetcha@aol.com." The subscriber information obtained from America On Line revealed that the account was registered to a "Joe Smith" at 1234 Town Road, Anytown, USA.

Using this information, law enforcement agents were able to locate the target, who confessed to sending the threats.

This information might also have been used to constitute probable cause needed to secure a search warrant for Joe Smith's computer. The next step in developing probable cause would be a court order under 18 U.S.C. § 2703(d) for a search warrant on the Internet Service Provider, or "ISP", for log files relating to "Illgetcha@aol.com." The log files would typically determine whether the individual was on line at the date and time the threat was sent, and if the individual was using a telephone line to access the Internet, the number from which he or she called.

The above case is relatively simple, because America On Line and other for-pay services often maintain certain subscriber information for billing purposes. But what if the target was

using a free e-mail service, such as Hotmail, which does not maintain billing records?

**b. Hypothetical Case Scenario #2**

Assume that the target was using the e-mail address "Threatnu@hotmail.com." Hotmail, like America On Line, requests certain information such as name and address when signing up for an account. Hotmail users also have the option of creating profiles about themselves for other Hotmail users to read. However, the information provided to Hotmail and in the profile may or may not be accurate. Unlike America On Line, because Hotmail is free, there are no billing records, and therefore, Hotmail does not confirm that information. As such, if the threat was sent using a Hotmail account, it will be necessary to obtain the Internet Protocol or "IP" Address that the target was using when the threat was sent.

Here again, the first thing you should do is send a freeze order to Hotmail to preserve all records relating to the subscriber account "Threatnu@hotmail.com." Then you want to identify the computer used to send the threat. Hotmail has recently begun including in the expanded header of e-mails, the IP Address that was used to access the Hotmail account. By viewing the expanded header of the threatening message, you would determine that the "originating IP Address" is, for example, 123.456.789.012. Next, you would do a "Whois" lookup of that originating IP Address. "Whois" is a service which identifies the owner of a particular IP Address. Assume the owner of the IP address in this scenario is LottaNet. You should first send a freeze order, followed by serving a grand jury subpoena on LottaNet for any and all information identifying the user(s) of the IP address on the date and time in question. If you are lucky, this will identify the perpetrator. It may, however, only lead you to another ISP which you will also have to subpoena. Finally and unfortunately, the IP Address may be a dead end because some computer-savvy criminals know that Hotmail includes the originating IP address and will send e-mails from a public computer with Internet access, for example, at a public library.

Of course, every case has its own specific set of facts and circumstances and requires an individual analysis. The above analysis may not apply to every on-line threats case but is meant as a guide. If you have specific questions, you should contact your local District Attorney's Office, or the Attorney General's High Tech and Computer Crime Division.

## **II. Possible Criminal Charges**

The following are some of the charges you may wish to consider in an e-mail or Internet threats case. Keep in mind, however, that the charges will vary depending on the facts and circumstances of each case. If in doubt, contact our local District Attorney's Office, or the Attorney General's High Tech and Computer Crimes Division.

**a. Stalking:**

Stalking, G.L. c. 265, § 43, may be charged where there is (1) a series of acts over a period of time directed at a specific person which seriously alarms or annoys the person and would cause a reasonable person to suffer substantial emotional distress, and (2) where the individual makes a threat with the intent to place the victim in imminent fear of death or bodily injury. Such conduct or acts include but are not limited to, conduct, acts or threats conducted by mail, telecommunication device or e-mail, Internet and facsimile. An individual convicted of this crime may be punished in the state prison for not more than five years or by a fine of not more than \$1000, or in the house of correction for not more than two and one-half years.

**b. Harassment:**

A new criminal harassment law was enacted on November 1, 2000. This law, "An Act

Relative to the Crime of Criminal Harassment", G.L. c. 265, § 43A, punishes persons who willfully and maliciously engage in a knowing pattern of conduct or series of acts over a period of time directed at a specific person, and includes harassment by conduct or acts including but not limited to conduct or acts conducted by mail, telephonic or telecommunication device or e-mail, Internet and facsimile. Unlike the stalking law, however, the individual need not make the threat with the intent to place the victim in imminent fear of death or bodily injury. Under the criminal harassment law, it is enough that the conduct of the target seriously alarms the victim and would cause a reasonable person to suffer substantial emotional distress. The crime is punishable by imprisonment in the house of correction for not more than two and one-half years or by a fine of not more than \$1000 or both imprisonment and a fine. This law goes even further than the stalking law. The sentence for an individual who has previously been convicted of the crime of criminal harassment and commits a second or subsequent such offense, or an individual who commits the crime of criminal harassment having previously been convicted of stalking, is imprisonment in a house of correction for not more than two and one-half years or imprisonment in the state prison for not more than ten years.

**c. Threats:**

You may also wish to consider charging the target with threats under G.L. c. 275, § 2 which carries a punishment of imprisonment of up to six months, or a fine of not more than \$100, or a court-ordered recognizance.

**d. Disorderly Conduct:**

Another possible charge is disorderly conduct under G.L. c. 272, § 53 which carries a punishment of imprisonment in jail or a house of correction for up to six months, or by a fine of not more than \$200, or both. While this charge is not applicable in the above hypotheticals, it may be applicable where the defendant's actions were reasonably likely to affect the public, and the defendant either intended to cause public inconvenience, annoyance or alarm, or recklessly created a risk of public inconvenience, annoyance or alarm.

# A HANDS-ON GUIDE TO VICTIM COMPENSATION IN MASSACHUSETTS

Cheryl Watson, Director  
Victim Compensation and Assistance Division  
Community-Based Justice Bureau

As a member of the law enforcement community, you often see, first hand, the devastating physical and emotional effects that violent crime has on victims and their loved ones. Most of us, however, do not see the financial impact of crime -- the astronomical medical expenses, lost wages, funeral expenses and loss of financial support for the families left behind. For many victims, you may be the only source of information about victim compensation. Because of this, it is critical that you know there is financial assistance available in Massachusetts to help ease the financial burden for many people who become victimized each year.

The Victim Compensation Program, which began in 1968 as a court-based program, was established to help relieve some of the financial burdens victims face in the aftermath of crime. Today, the program, governed by G.L. c. 258C, is administered by Attorney General Tom Reilly's Victim Compensation and Assistance Division. The program provides financial assistance to eligible victims and their families for medical and dental expenses, mental health counseling, funeral expenses, lost wages and loss of support.

In some instances, a victim's case may not go through the criminal justice system. If that occurs, a law enforcement agent may be the only person who can provide information about the availability of this important financial assistance. This article will help you understand the program so you can make appropriate referrals for victims who suffer financial consequences or face financial crisis.

## What is Victim Compensation?

Victim Compensation funds are available to help reimburse or pay for certain out-of-pocket expenses incurred by victims and their families as a direct result of violent crime. In 2000, the Victim Compensation and Assistance Division (Division) awarded almost \$3 million to crime victims. Eligible victims and their families can receive up to a maximum award of \$25,000, although the average award is generally under \$3,000.

To apply for victim compensation, the victim or family member must complete and submit to the Division a simple two-page application form. The Division staff determine eligibility, verify claims for compensation and issue awards generally within four to six months. Most awards are made directly to hospitals and medical and mental health providers. Lost wages and loss of support awards are paid to the victim or family member.

Since Victim Compensation is a fund of last resort, as established by statute, insurance and other sources of payment must first be utilized. For many victims, this program is the only source of available funding to help them cope with the financial costs of crime.

### **Who is eligible for Victim Compensation?**

Victim Compensation is available to victims of violent crime and family members of a homicide victim for crimes occurring in Massachusetts. A minor who is a witness to domestic violence or other violence against a family member is also eligible for benefits. The statute defines crime as an act which involves the application of force, intimidation or violence or the threat of force, intimidation or violence. This includes any violation of G.L. c. 90, §§ 24 through 24 O (the motor vehicle laws) or any violation of G.L. c. 209A (the domestic abuse law).

### **What expenses are covered by Victim Compensation?**

Victim Compensation can pay for the following expenses if incurred as a direct result of a violent crime:

- Medical expenses, including hospital, ambulance, rehabilitation services and equipment, prescription medications, prosthetic devices and plastic surgery;
- Dental expenses;
- Mental health counseling for the victim, family and dependents of a homicide victim and children who witness violence against a family member;
- Funeral and burial expenses, up to \$4,000.00;
- Lost wages due to physical or psychological injury as a direct result of the crime;
- Loss of income for dependents of a homicide victim.

The maximum award allowed is \$25,000. The program does not compensate for property loss or pain and suffering. Investigators in the Division verify all expenses to determine the amount to be awarded.

### **How is eligibility determined?**

Victim Compensation and Assistance Division staff review each case to determine if the person applying for compensation is eligible under the statute. To be eligible, the statute requires that:

- A violent crime was committed;
- The crime occurred in Massachusetts;
- The crime was reported to law enforcement officials within five days, unless there is good cause for delay;
- The victim cooperated with law enforcement officials in the investigation and prosecution (if an arrest was made), unless the victim had a reasonable excuse for failure to cooperate; and

- The claim must be filed within three years of the date of the crime, or three years from the minor victim's 18th birthday.

A victim can be eligible for compensation even if there is no arrest or prosecution. If there is no arrest or prosecution, it is particularly important that you tell the victim about the Victim Compensation program. The Division relies on information provided by law enforcement officials to determine eligibility. You may receive a call from the Division to verify information about a crime. If the Division has difficulty obtaining information, a victim's claim may be unnecessarily delayed.

The statute provides for a few exceptions to the above requirements. If you have questions concerning a case on which you are working, staff in the Division is always available to answer questions and provide information.

### **How do I make a referral to the Victim Compensation Program?**

- Obtain Victim Compensation applications and palm cards to make available to victims and their family members;
- Contact the Victim Compensation and Assistance Division at the Attorney General's Office, One Ashburton Place, Boston, MA 02108, (617) 727-2200;
- Go to our Web site at <http://www.ago.state.ma.us>.

As a first responder, investigator or prosecutor, you may be the only person who will provide information and assistance to hundreds of people who become victims of violent crime each year. As such, it is critical that you know about the Victim Compensation program and refer victims to the Office of the Attorney General's Victim Compensation and Assistance Division.

If you need palm cards, pamphlets or further information about the Victim Compensation program, please call the Victim Compensation and Assistance Division at (617) 727-2200.

# ATTORNEY GENERAL REILLY SPONSORS CONFERENCE ON PROTECTING STUDENTS FROM HATE CRIMES AND HARASSMENT

Barbara Berenson, Assistant Attorney General  
Community-Based Justice Bureau

On November 9, 2000, 165 educators and school-based police officers, representing 20 school districts in four counties, gathered in Northampton for a full-day conference entitled: **A Prerequisite for Safe Schools: Protecting Students from Hate Crime and Harassment.** Invited to this conference, the first in a series of regionally-based civil rights training conferences, were teams of educators from Berkshire, Franklin, Hampden, and Hampshire counties. The Conference focused on *Protecting Students from Harassment and Hate Crime: A Guide for Schools*. This guide is a joint publication of the National Association of Attorneys General and the Office of Civil Rights, and is endorsed by the National School Boards Association.

The next conference, which will include Essex, Middlesex, and Suffolk counties, will be held on February 8, 2001.

Each participating school district sent one or more three to five member teams comprised of principals, vice-principals, guidance counselors, curriculum coordinators, equity coordinators, and student leaders. Registration by teams was required, as a key goal of the conference was for each team to develop initial steps of an action plan for implementing policies, protocols, and programming to address hate and harassment in a school-based setting. Presenters and facilitators included nationally recognized experts in civil rights issues as well as local educators, police, and prosecutors from the offices of Berkshire County District Attorney Gerard Downing, Hampden County District Attorney William Bennett, and Northwestern District Attorney Elizabeth Scheibel.

Following an enthusiastic welcome from Attorney General Tom Reilly and an inspirational keynote address by William Johnston, former Commander of the Community Disorders Unit of the Boston Police Department and nationally-recognized hate crimes expert, conference participants settled down to the hard work of learning how to assess and improve school climate. Civil Rights Division Chief Richard Cole provided a legal overview of applicable state and federal laws, while panelists from the state Department of Education (DOE), the Office for Civil Rights of the United States Department of Education (OCR), the Holyoke public schools, and the Attorney General's office explained key legal requirements and practical necessities of crafting individualized school policies to combat hate and harassment.

Participants then had a chance to compare their responses to case studies of school-based harassment and hate crimes with responses from panelists that included police, prosecutors, educators, a student, and representatives from DOE and OCR. The case studies were designed to illustrate the many ways in which hate and harassment are manifested at school, ranging from clear-cut cases of physical violence and verbal slurs to more subtle instances of intolerance. The case studies also focused the audience's attention on some of the most challenging and crucial aspects of enforcing a comprehensive policy, such as promptly responding to less serious harassment before it escalates into something more serious.

During a working lunch, participants met as teams to collaborate on the first steps of an individualized action plan to improve their schools' climates and policies. Suggested items for teams to consider included:

- methods to assess school climate;
- ideas for staff and student training events;
- plans for community outreach;
- development and implementation of prevention and response policies; and
- programming to improve school climate.

The afternoon sessions focused on ways that schools can use available resources to implement their action plans. During a session entitled *Creating Safe Schools that Appreciate Diversity*, participants heard from representatives of many successful school-based programs, including the Student Conflict Resolution Experts (SCORE) and Conflict Intervention Team (CIT) programs of the Attorney General's office, the Anti-Defamation League's World of Difference program, the Student Civil Rights Project of the Governor's Task Force on Hate Crime, and the Flashpoint Close-Up on Civil Rights program developed in the Office of Essex County District Attorney Kevin Burke. Karen McLaughlin, the Director of the National Center for Hate Crime Prevention at the Education Development Center, also provided a helpful overview of many excellent programs and curricula available to guide schools in achieving their mission of creating a hate- and harassment-free atmosphere. The final session of the day focused on ways in which schools can form effective partnerships with the local community, including police, prosecutors, community-based civil rights enforcement agencies, and community organizations, to help achieve their critical mission of making schools safe and welcoming to all students.

The Office of the Attorney General has updated and reissued its brochure entitled **Erasing Hate, A Guide to Your Civil Rights in School: Your Right to be Free From Discrimination, Harassment, and Hate-Motivated Violence**. This brochure explains to students their legal right to attend school in an environment that is free from discrimination, harassment, and hate-motivated violence based on race, color, religion, national origin, ethnic background, gender, sexual orientation, or disability, and provides information on where students can turn for help if these rights are violated. For a free copy of this pamphlet, please call the Attorney General's publication office at (617) 727-2200. The pamphlet is also available on the Attorney General's Web site at <http://www.ago.state.ma.us>.

# NURSING HOME NEGLECT AND ABUSE UPDATE

Nicholas Messuri, Chief

Robert Patten, Assistant Attorney General

Medicaid Fraud Control Unit

Business and Labor Protection Bureau

Attorney General Thomas F. Reilly has consistently demonstrated his commitment to the protection of the elderly citizens of the Commonwealth. The Medicaid Fraud Control Unit (MFCU) is the primary mechanism by which the Attorney General protects elderly and disabled residents of Massachusetts nursing homes from physical neglect and abuse and financial exploitation. In recognition of Attorney General Reilly's leadership in this arena, the Massachusetts legislature in January of 2000 significantly increased its commitment of funds to MFCU and to the Massachusetts Department of Public Health (DPH) for the detection, prosecution and prevention of patient abuse in nursing homes.

The Attorney General's Medicaid Fraud Control Unit has two principal bases for prosecuting businesses and individuals who abuse and exploit nursing home patients. First, under the federal Social Security Act, MFCU is required to review complaints of patient abuse and neglect in Massachusetts residential health care facilities that receive Medicaid funds, and to prosecute those individuals responsible for physical and financial abuse of the frail elderly who reside in nursing homes. Second, under Massachusetts law, MFCU is authorized to prosecute health care providers, including nursing home operators, who charge the Medicaid program for services that are not provided. Because the Massachusetts Medicaid program contributes \$1.65 billion dollars — 70 % of total operating costs — to the Commonwealth's 550 long-term care facilities each year, MFCU's role in policing nursing home expenditures is substantial. The Attorney General is committed to ensuring that Medicaid funds are spent in the provision of high-quality care to our senior citizens.

Since its establishment in 1978, the Massachusetts MFCU has developed special expertise in detecting and prosecuting neglect and abuse of nursing home patients. MFCU is staffed by coordinated teams of attorneys, investigators, nurses, financial analysts and computer experts, and has applied its investigative expertise to cases involving physical, psychological and sexual abuse of nursing home patients, misappropriation of funds from patient accounts, embezzlement of institutional funds and a wide variety of billing abuses. Working in partnership with DPH, the Division of Medical Assistance, industry groups, and state and local law enforcement officials, MFCU has focused its efforts on those nursing homes that have a history of providing substandard care, and has prosecuted or otherwise resolved hundreds of matters involving allegations against long term care facilities.

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**Prosecutions of Nursing Home Abuse**

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- A former certified nurse's aide (CNA) from Worcester was found guilty by a jury in Worcester District Court of assault and battery on an Alzheimer's patient living in a Worcester nursing home. The defendant was employed as a CNA at the Worcester facility when he assaulted and physically abused the 72 year-old man, who suffered from extreme confusion and delusions as a result of his medical condition. The defendant had received specific training in the care of Alzheimer's patients and others suffering from an inability to understand their surroundings, and in the implementation of patient-specific care guidelines designed to minimize reactions of fear and resistance to care. The defendant's co-workers testified that they saw him assault and manhandle the elderly resident on two occasions when the resident resisted the defendant's attempts to provide personal care.
- A former CNA at a Wellesley facility pleaded guilty in Dedham District Court to one count each of patient abuse and assault and battery on an Alzheimer's patient. The defendant agreed to the guilty plea as her trial was scheduled to begin. Her co-workers were prepared to testify that she had retaliated for a scratch on the arm by punching the 79 year-old victim in the stomach while attempting to bring her to a whirlpool bath.
- A Dorchester woman was convicted in Dedham District Court of patient abuse and assault and battery perpetrated against a 92 year-old resident of a Wellesley facility. The defendant was witnessed slapping and kicking the elderly man while she was assigned to assist him in getting into bed.
- A North Shore man pleaded guilty to patient abuse and assault and battery in Lynn District Court after violently throwing a patient to the floor in a Lynn long-term care facility. The patient, who suffered from the effects of a traumatic head injury, had a history of setting off door alarms and then hiding from facility staff. A co-worker witnessed the defendant attacking the patient in retaliation for this behavior.
- A former security guard at a Roxbury nursing home pleaded guilty to assault and battery in Roxbury District Court following an attack on an elderly resident of the facility. The defendant, upset with a nursing home patient who had been smoking during a non-smoking period, grabbed the patient by the wrists and forced him to the ground, breaking his hip.

Certified nurse's aides convicted of the crime of patient abuse are automatically stripped of their professional licenses as a consequence of their crimes, and are barred for life from working as CNAs in Massachusetts. In view of the seriousness of the assaults perpetrated against these vulnerable victims, however, this sanction is often insufficient to punish the perpetrators or to deter others from engaging in similar misconduct. MFCU's successful 1999 prosecution of CNA Stacy H. Arruda, who was sentenced to a state prison term of four to five years for the physical abuse of elderly nursing home residents, was a watershed event in the Attorney General's ongoing effort to bring patient abuse to the attention of the courts, the legislature and the public. The Attorney General is confident that as MFCU brings more of these cases to trial, judges will, where appropriate, sentence the perpetrators of patient abuse to committed jail time in recognition of the seriousness of the crimes involved.

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**Referrals and Investigations**

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Patient abuse is defined under state law as any physical contact which harms or is likely to harm a resident of a long-term care facility licensed by the Commonwealth. State regulations require that any such abuse be reported by workers in nursing homes and investigated by the facility. Such reports are forwarded to DPH, and ultimately may be referred to MFCU for prosecution. Other referral sources include local law enforcement officials and family members of nursing home residents. MFCU attorneys and investigators carefully review all such referrals to determine whether criminal conduct has occurred.

Because witnesses are reluctant to come forward to testify against their co-workers, and because the victims of abuse are themselves frequently unable to present testimony in their own behalf, the prosecution of patient abuse cases requires the special expertise developed by the Attorney General's MFCU. In particular, successful prosecution often relies upon circumstantial evidence. To promote the development of meritorious case referrals, nurse-investigators and attorneys from the staff of MFCU have provided detailed specialized training on document analysis and interviewing techniques to DPH investigative personnel. MFCU's goal in providing educational outreach is to teach the skills needed in order to determine the truth in the face of inadequate documentation and uncooperative witnesses, and to promote attention to detail on the part of our referral sources. Under the direction of Attorney General Reilly, MFCU will continue to take all necessary steps to deter abuse of nursing home patients, and to ensure that the victims of this crime, who are among our most vulnerable citizens, receive justice.

For more information or to refer a case, contact the Medicaid Fraud Control Unit at (617) 727-2200, ext. 3495.

## CASE SUMMARIES

### I. SEARCH AND SEIZURE

#### A. Warrantless Searches

United States Supreme Court declares roadblock checkpoints for unlawful drugs unconstitutional. City of Indianapolis v. Edmond et al., 121 S. Ct. 447 (2000).

The City of Indianapolis implemented motor vehicle checkpoints to interdict narcotics. At each checkpoint, the police would stop a predetermined number of cars, a narcotics-detection dog would sniff around the outside of the car, and if the police had particularized suspicion of drugs, or consent, the police would then conduct a search of the car.

The Supreme Court held that the roadblock checkpoints were unconstitutional where their primary purpose was to detect evidence of ordinary criminal wrongdoing. In so holding, the Supreme Court distinguished prior cases where it upheld border checkpoints to intercept illegal aliens (United States v. Martinez-Fuerte, 428 U.S. 543 (1976)), and roadblock checkpoints designed to remove drunk drivers from the road. Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990).

The Court remarked that "each of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety. Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment."

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Supreme Judicial Court reverses granting of motion to suppress the results of field sobriety

tests. Commonwealth v. Eckert, 431 Mass. 591 (2000).

The defendant was charged with operating a motor vehicle while under the influence. The police administered field sobriety tests after checking on the well-being of the defendant while stopped at a rest stop. The officer smelled alcohol and saw bloodshot eyes. The district court judge granted the defendant's suppression motion on the ground that the officer did not have probable cause to administer the field sobriety tests.

The Commonwealth appealed, and the SJC held that the motion judge erred in requiring a showing of probable cause rather than reasonable suspicion. The case was remanded back to the District Court. In so doing, the SJC reiterated that the trooper's initial approach to check on the well being of a motorist does not constitute a "seizure" under the Fourth Amendment or article 14 of the state constitution. The facts before the SJC were insufficient to determine whether the trooper had a reasonable basis to suspect that the defendant was operating while under the influence. The trooper had testified that the car's engine was running when he approached the vehicle. The motion judge's findings were silent, however, as to that piece of information, which the SJC characterized as "critical". Operating a motor vehicle includes the "intentional act of starting the vehicle's engine."

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Defendant's drug conviction upheld where stop did not occur until police demanded defendant halt. Commonwealth v. Grandison, 432 Mass. 278 (2000).

The defendant, who was walking in a high drug area, did an "about face" upon seeing a police cruiser. The police got suspicious, began to follow the defendant, when he again did

an "about face". At that point, the police put on their high beams and continued to follow the defendant into an alley. Once in the alley, the police turned on the alley lights and saw the defendant spit something out of his mouth. The officer testified that people commonly hide crack cocaine in their mouths to avoid detection.

The police told the defendant to stop, and found what they believed to be crack cocaine on the ground. They arrested the defendant. The defendant argued that the police did not have reasonable suspicion to justify a "stop" in the alley.

The SJC disagreed, and held that while police must have reasonable suspicion to begin a pursuit of another, following a person without more does not constitute pursuit. Here, the Court held that because the police did not activate the cruiser's blue lights, siren or flashers, the pursuit and stop did not occur until the officers actually instructed the defendant to stop in the alley. The Court explicitly left open the question whether "shining bright alley lights on citizens could in some circumstances be a stop". The SJC further rejected the defendant's argument that the police did not have reasonable suspicion to conduct an investigative stop. Although neither being in a high crime area nor merely walking away from police alone is enough to justify a stop, being in a high crime area, walking away from the police, changing directions and spitting something out of one's mouth, does support reasonable suspicion that the defendant had illegal drugs.

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Independent evidence rendered the seizure of cocaine lawful even where such seizure could not be justified as incident to arrest. Commonwealth v. Swezey, 50 Mass. App. Ct. 48 (2000).

Undercover narcotics officers observed a car signal to another car in an area known for drug transactions. The police then saw the defendant leave his car and return shortly carrying a paper bag. The officers followed the defendant and stopped him at a red light believing they had

witnessed a drug deal. The defendant attempted to get away and in so doing, hit one of the officers with the car. The defendant was arrested for assault and battery on a police officer. The police retrieved the paper bag which contained a large amount of cocaine.

The Appeals Court agreed with the defendant that the seizure of the cocaine was not proper as a search incident to an arrest because the cocaine was not an instrumentality of the assault and battery. However, the court concluded that the search and seizure were permissible where the officers had a reasonable suspicion that the defendant had committed a crime, and thus, the stop at the red light was a proper investigatory stop. Once the defendant tried to get away, probable cause existed to justify arresting the defendant for illegal drugs, allowing the police to search the car for drugs. The court noted that the approach to the defendant's car did not constitute an arrest, and that stopping the defendant's car was "reasonable and proportional" to the circumstances.

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Defendant's drug conviction reversed where evidence of police brutality was excluded from the trial. Commonwealth v. Hall, 50 Mass. App. Ct. 208 (2000).

The defendant was convicted of trafficking in cocaine. He claims that his motion to suppress should have been granted and that the exclusion of evidence of police brutality deprived him of a fair trial.

The Appeals Court upheld the denial of the motion to suppress, concluding that although the informant's tip was not based entirely on personal knowledge, that deficiency was compensated for by police corroboration. The informant's description of what would ensue during an anticipated drug deal occurred. When the defendant fled and threw the drugs to the ground, the police had probable cause to arrest.

As to the exclusion of evidence of police brutality, however, the Appeals Court agreed with the defendant and reversed his conviction.

The trial judge had ruled that the issue of alleged police brutality was "collateral" and hence, inadmissible. The Appeals Court disagreed, concluding that where all of the prosecution witnesses were members of the police department, possible bias was relevant and admissible.

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Informant's tip that defendant had gun was insufficient to permit threshold stop. Commonwealth v. Barros, 49 Mass. App. Ct. 613 (2000).

An unfamiliar individual motioned a police officer to stop, identified himself, and described an individual whom he had just seen pull a handgun out of his waistband. The officer then located the defendant who ignored the officer's request to talk. After back-up officers arrived, the defendant finally stopped and the original officer saw the defendant move his hands out of view and toward his waistband. Fearful, based on the information he had received, the officer drew his gun and ordered the defendant to make his hands visible. The officer frisked the defendant and found a loaded handgun, whereupon the defendant admitted that he did not have a license to carry the gun.

The defendant's motion to suppress was denied based on the judge's determination that the defendant was not seized until the officer drew his gun.

The Appeals Court reversed, although in so doing, the court reiterated that police may frisk an individual for safety reasons when a investigating someone believed to be armed and dangerous. The court further noted that a seizure does not occur unless the police restrain the liberty of another by physical force or a show of authority. Here, the court stated that the officer's initial request for the defendant to stop did not constitute a seizure, but when the officer followed up with a command, accompanied by two back-up officers, a reasonable person would not have felt free to leave, and thus, a seizure occurred.

Despite some misgivings, the Appeals Court held that the officer did not have an objectively

reasonable suspicion of criminal activity to justify the seizure. The officer suspected that the defendant had a handgun but there was no evidence prior to the seizure that he did not have a license to carry or that he was intending to commit a crime with the gun. A police officer is not permitted to stop and frisk an individual just because it seems more likely than not that a person is not licensed to carry a gun. The court addressed the difficult nature of the situation and acknowledged that if the defendant had looked young, the police could have reasonably suspected that he could not have had a license to carry.

The court explicitly said, however, that "it was good police work to respond to the tip", but "in a free society, the balance between the public interest and individual freedom from governmental interference tilts in favor of individual freedom."

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Where an officer had probable cause to arrest a minor for possession of alcohol, a gun seized as a result of a search was admissible. Commonwealth v. Moscat, 49 Mass. App. Ct. 622 (2000).

An officer familiar with the area and the individuals saw a group of youth standing next to several bottles of beer. The officer told the youth to leave, but noticed one youth bending over the handlebars of his bicycle as if to conceal an item. Believing the item to be beer, the officer began to reach his hand toward the defendant's shirt when a gun fell to the ground.

The defendant's motion to suppress was denied. The Appeals Court affirmed the denial and ruled that the search was incident to a lawful arrest for possessing alcohol while underage. In so holding, the court noted that the cumulative factors of a report that rowdy teenagers were drinking in the area, the officer's observation that the defendant was underage, and the defendant's attempt to hide something amounted to probable cause to arrest. The fact that the search preceded the actual arrest is im-

material provided that probable cause existed independently of the search results.

Commonwealth v. Bruno, Davila, and Wilson,  
432 Mass. 489 (2000).

## **II. STATUTORY / RULE INTERPRETATION**

Judges have authority to enter findings of not guilty after prosecutor's opening statement, but once done, even in error, principles of double jeopardy prohibit retrial. Commonwealth v. Lowder, 432 Mass. 92 (2000).

The trial judge entered a finding of not guilty after the defense objected to portions of the prosecutor's opening statement. The Commonwealth sought a declaration, pursuant to G.L. c. 211, § 3, that the court lacks jurisdiction to enter a required finding until the Commonwealth rests its case. The SJC first held that the Commonwealth correctly petitioned under c. 211, § 3, where no rule or statute authorizes the Commonwealth to appeal from such an order. The SJC concluded, on the merits, that judges have "inherent power" to issue findings of not guilty in a criminal case immediately following a prosecutor's opening statement. Once such an order issues, however, the Commonwealth is barred from retrying the defendant due to the principles of double jeopardy. Hence, the SJC cautioned against entering a finding of not guilty at such an early stage unless "it clearly appears from the opening statement that the defendant cannot be lawfully convicted and then only after the prosecutor has been made aware of the difficulty and fails or is otherwise unable to correct it." Before entering such an order, judges should follow two procedural safeguards: 1) the prosecutor must be provided an opportunity to be heard, and 2) the trial judge must carefully consider possible alternatives.

SJC holds that the civil commitment proceedings initiated against three defendants whose convictions of sexual offenses predate the effective date of the statute was proper.

On the day before three defendants were scheduled to be released from prison for their convictions on sexual offenses, the Commonwealth filed petitions seeking commitment as a sexually dangerous person under the newly-enacted civil commitment laws which went into effect September 10, 1999. The defendants moved to have the petitions dismissed primarily claiming that the new law did not apply to individuals whose convictions occurred prior to September 10, 1999, as well as raising constitutional challenges. The Superior Court dismissed the petitions on the ground that the defendants' convictions predated the effective date of the legislation. The Commonwealth appealed.

The SJC rejected the defendants' constitutional claims, and held that the civil commitment proceedings were properly brought where the convictions occurred prior to the September 10, 1999, effective date of the statute. Specifically, the Court concluded that the current mental state of the defendants, not the date of the prior conviction, is the conduct which triggers the application of the statute. As a result, the statute is deemed prospective, not retrospective.

The SJC further rejected the defendants' constitutional claims, holding that the civil commitment statute is remedial, not punitive, and thus does not constitute an ex post facto law, and that the statute's provision permitting temporary commitment pending a probable cause hearing in particular circumstances does not violate procedural due process.

Importantly, the SJC also clarified that the standard of proof required to temporarily commit a person is the "directed verdict" or "probable cause" standard, and not the probable cause to arrest standard.

SJC holds that Juvenile Court judges have authority to set probationary conditions for a juvenile's release with juvenile's consent, and court has inherent power to revoke a juvenile's bail for violation of such conditions. *Jake J. v. Commonwealth*, 433 Mass. 70 (2000).

A juvenile judge released a juvenile on cash bail and provided bail warnings, after which the juvenile and his mother signed a probation form which included "conditions of release", one of which was to obey all school rules. Upon learning that the juvenile had been disruptive in school, the Commonwealth moved to revoke bail. The juvenile judge treated the proceedings as a bail revocation hearing under G.L. c. 276, § 58B. In response, the juvenile filed a petition for relief from the SJC pursuant to G.L. c. 211, § 3, contending that the judge lacked authority to set conditions of bail, or in turn, to revoke bail.

The juvenile argued that he was never placed on pretrial probation and that the only reason his bail could be revoked was if he were charged with a new crime. According to the juvenile, his conditions of release could not have arisen under G.L. c. 276, § 87, but only under c. 276, § 58, and because the SJC held in *Commonwealth v. Dodge*, 428 Mass. 860 (1999) that a judge lacked authority to set pre-trial conditions of release under § 58 absent a defendant's consent, the conditions of release established for the juvenile were of "no effect".

The SJC concluded that § 87 expressly gives the court "authority to impose conditions of pre-trial release when [the] defendant consents and is placed on probation". As such, the Court held that the juvenile court judge had authority to place the juvenile on pretrial probation with conditions of release on bail.

In so holding, the SJC emphasized that in the future, judges must make it clear, on the record, that a "juvenile is being released on bail or personal recognizance pursuant to G.L. c. 276, § 58, and that, with his consent and agreement, he is simultaneously being placed on probation

pursuant to § 87. Further, it should be explained to the juvenile that any agreed-on conditions of probation also constitute the conditions of his release. Finally, the judge should explain the consequences of violating any of the agreed-on conditions. We stress that these requirements are matters of substance, not merely of form."

Finally, the SJC held that the juvenile judge did not err in applying the requirements of G.L. c. 276, § 58B in conducting the revocation hearing, but suggested that the Legislature may want to "consider adopting a procedure for § 87 proceedings that adequately balances the interest of accused juveniles and the judges who administer their cases."

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A probationer does not have a right to bail where probable cause has been found at a preliminary probation revocation hearing and an order of custody has been issued. *Commonwealth v. Puleio*, 433 Mass. 39 (2000).

The petitioner filed a bail review petition after a District Court judge found probable cause at a preliminary probation revocation hearing and ordered the petitioner detained pending the final probation revocation hearing. A Superior Court judge ordered the probationer released, and the District Court judge reported two questions of law to the Appeals Court. The SJC granted the defendant's application for direct appellate review.

The first reported question was whether a probationer has a right to bail after probable cause is found at a preliminary probation revocation hearing and an order of custody has issued. The SJC answered the question in the negative, holding that Rule 8(d) of the District Court Rules for Probation Violation Proceedings states that a court "shall not consider or impose any terms of release such as bail ... as an alternative to such custody" if a judge decides to detain a probationer. The SJC also answered "no" to the second reported question which was whether a probationer could seek bail in the Superior Court after having been ordered de-

tained by the District Court following a preliminary probation revocation hearing.

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Commonwealth is not required to prove that a defendant knew that he was selling drugs to a minor. Commonwealth v. Montalvo, 50 Mass. App. Ct. 85 (2000).

The defendant appealed his conviction of exploiting a minor to distribute drugs under G.L. c. 94C, § 32K, claiming that the trial judge erroneously instructed the jury that the Commonwealth was not required to prove that the defendant knew he was using a minor for the drug transaction.

The Appeals Court outlined numerous instances where the government is not required to prove that a defendant knew the age of the victim: statutory rape, indecent assault and battery on a child under 14, selling alcohol to a person under 21, and unarmed robbery of a person over 65. The court explicitly stated that if the case of Commonwealth v. Kirkpatrick, 44 Mass. App. Ct. 355 (1998), suggested a contrary conclusion, Kirkpatrick is overruled.

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Defendant's revocation of probation reversed where he did not receive written notice of the alleged violations. Commonwealth v. Streeter, 50 Mass. App. Ct. 128 (2000).

The defendant was placed on probation for two years following his conviction for drug offenses. His probation order included a "stay away" order from a particular housing project.

Less than two years later, two criminal complaints were issued against the defendant. He received three notices of surrender and hearings for probation violations with notations stating "new" or "subsequent offenses", but no information about the alleged offenses. The district court revoked the defendant's probation.

The Appeals Court reversed the revocation, holding that the absence of information concern-

ing the new or subsequent offenses deprived the defendant of his constitutional right to due process.

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A probation "contract" outlining conditions of probation is not binding; only a judge's order on conditions of probation is enforceable. Commonwealth v. MacDonald, 50 Mass. App. Ct. 220 (2000).

The defendant's conditions of probation included staying away from a particular woman. Following the defendant's probation violation hearing, he signed a "probation contract" outlining his new conditions of probation, three of which had been handwritten by his probation officer.

Almost two years later, the defendant wrote a letter to the woman who was the subject of the "stay away" order which triggered a probation surrender notice. The defendant filed a motion to dismiss, alleging that the original sentencing judge had ordered him to "stay away" from the woman, but had not prohibited any "contact" with her. The district court denied the motion, stating that although the docket entries did not reflect the "no contact" condition, the defendant had entered into a binding probation "contract".

The Appeals Court acknowledged that conditions of probation are often referred to as "contracts", but emphasized that where there is no mutuality of agreement or obligation given the unequal status of the parties, a defendant's signature on a probation form does not "constitute his assent to a negotiated agreement". Only a judge can order conditions of probation, not a probation officer. Because the Commonwealth did not demonstrate that the original sentencing judge ordered the defendant to have "no contact" with the woman, the order denying the defendant's motion to dismiss was vacated and the matter remanded for further proceedings consistent with the court's opinion.

Appeals Court holds that convictions for causing damage by malicious explosion and throwing an explosive device with intent to cause damage are not duplicative. Commonwealth v. Hammond, 50 Mass. App. Ct. 171 (2000).

The defendant claimed that his convictions for being an accessory before the fact to causing damage to property or injury to a person by malicious explosion under G.L. c. 266, § 101, and throwing an explosive device with intent to damage property or injure a person under G.L. c. 266, § 102, were duplicative and thus subjected him to double jeopardy.

In analyzing the two statutes, the Appeals Court concluded that Section 101, the malicious explosion statute, is the completed act of causing an unlawful explosion that damages or destroys property or injures a person. By contrast, Section 102, does not necessarily require a completed act; an individual can be guilty of violating Section 102 by throwing an explosive device without having the device explode or by throwing a device which explodes but does not cause damage or injury to a person. Accordingly, the throwing offense requires the additional element of "throwing" which the malicious explosion statute, Section 101, does not.

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### **III. EVIDENCE**

Defendants' convictions reversed where the evidence was insufficient to demonstrate that actual or constructive possession of contraband occurred. Commonwealth v. Brown, 50 Mass. App. Ct. 253 (2000).

Three defendants were convicted of possession of guns and ammunition. The evidence presented at trial centered around three 911 calls from individuals who reported hearing gunshots in their neighborhood. The second caller stated that she heard gunshots and saw three black men running through a parking lot and into a nearby

house. Her testimony at trial differed slightly and she could not make an in-court identification.

The police went to the house where the defendants allegedly had entered and despite hearing noises from within, did not get a response to their knocking. Police stationed at the back saw a woman and young child hurriedly leave the building. The police entered her apartment and found the three defendants and another man. After ordering the men to lie down, the police found a loaded handgun; outside the house, the police found a loaded sawed-off shotgun in the dumpster, an unloaded handgun in a shed, and spent ammunition nearby.

At trial, the Commonwealth argued that the defendants were guilty as joint venturers of possession of the firearms or guilty of constructive, if not actual, possession of a single firearm.

The Appeals Court noted that the defendants were charged solely with possession and not with any crime associated with the actual shooting. The court held that there was no evidence that any defendant aided another defendant in firing, getting, or maintaining possession of a gun, thereby eliminating a joint venture theory. The court concluded that a joint venture theory was inapplicable and should not have been submitted to the jury.

The Appeals Court further concluded that the evidence was insufficient to sustain the alternative theory of possession, constructive or actual. The gun found in the apartment was not in plain view, the gun was loaded and the spent shells found outside were of a different caliber. The jury could have inferred that the handgun was in the apartment prior to the arrival of the three defendants. As a result, the court held that the defendants' motions for required findings of not guilty should have been allowed.

# SUPREME JUDICIAL COURT HOLDS THAT STUDENT'S DRAWINGS CONSTITUTE CRIMINAL THREAT

By Assistant Attorney General Barbara F. Berenson

In a case with far-reaching implications for educators, the Supreme Judicial Court unanimously affirmed in *Commonwealth v. Milo M.*, S.J.C. No. 08269 (January 5, 2001), that a juvenile's drawings depicting him shooting his teacher constituted a criminal threat. In this case, a twelve-year-old Worcester boy drew two pictures that showed him shooting his teacher. The student and the teacher were clearly identified in both drawings. In the first picture, the juvenile is pointing a gun at his teacher who appears to be crying and is pleading, "please don't kill me." Next to the picture of the teacher is a drawing of a decapitated figure; at the bottom of the picture, the word "Blood" is written in large letters. In the second picture, the juvenile is again pointing a gun at his teacher. The teacher is shown in a kneeling position with her hands clasped in front of her; above her head appear the words "pissy pants." The first drawing was confiscated by another teacher, but the student displayed the second one to his teacher, angrily asking her "[d]o you want this one too?" The student was suspended for several days and charged with threatening to commit a crime, in violation of Mass. General Laws c. 275, s. 2.

Following a bench trial, Justice George F. Leary adjudicated the student delinquent for threatening his teacher.<sup>1</sup> The judge committed the juvenile to the custody of the Department of Youth Services, but ordered the sentence suspended until the juvenile's eighteenth birthday. The juvenile appealed, contending that the trial judge applied an improper legal standard and that there was inadequate evidence of the juvenile's intent and ability to carry out the threat. Because this case squarely posed the issue of what legal standard should apply to determine whether a communication constitutes a criminal threat, and because schools have been struggling with how to respond to threats of violence, this case generated considerable interest. Friend of the court briefs were filed by the Attorney General, the City of Worcester, and the Committee for Public Counsel Services.

Writing for the Supreme Judicial Court, Justice Roderick L. Ireland stated that "the elements of threatening a crime include an expression of intention to inflict a crime on another and an ability to do so in circumstances that would justify apprehension on the part of the recipient of the threat." The Court observed that there was ample evidence of the juvenile's intent, including the content of the drawings (despite not being a communicated threat, the first drawing retained its evidentiary value); the juvenile's repetition of images of himself as a perpetrator of violence upon his teacher; and the juvenile's angry and defiant manner when he displayed the second drawing to his teacher. The Court also took note of the juvenile's presence near the teacher's car later that same day.

<sup>1</sup> The judge based his adjudication of delinquency on the second drawing. The judge found that the first drawing was not a threat because the juvenile himself did not communicate it to his teacher.

As to the juvenile's ability to carry out the threat, the Supreme Judicial Court ruled that the Commonwealth need not prove that the juvenile possessed an immediate ability to carry out the threat at the time it was communicated. The Court also took judicial notice of recent highly publicized, school-related shootings, and concluded that these factors made the teacher's fear that the juvenile could carry out his threat "quite reasonable and justifiable."

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